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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

NOEL SCOTT,

Plaintiff and Appellant,

v.

COMERICA BANK, as Trustee, etc.,

Defendant and Respondent.

D053014

(Super. Ct. No. P193003)

APPEAL from an order of the Superior Court of San Diego County, Julia Craig Kelety, Judge. Affirmed.

Noel Scott appeals from an order granting in part and denying in part his petition under Probate Code section 15409, subdivision (a)¹ to modify and/or reform the Noel Scott Trust. Scott, who is incarcerated in Vacaville State Prison, sought to increase his monthly cash payment from \$50 to \$250, and the probate court doubled Scott's monthly distribution to \$100 but denied any further increase. Scott contends (1) the probate court

¹ All statutory references are to the Probate Code unless otherwise indicated.

erred because \$100 per month is insufficient to account for inflation or pay his medical and dental expenses, the cost of which he must bear; (2) the trust is ambiguous; and (3) the court ignored evidence establishing a variety of changed circumstances assertedly unforeseen by the trustor. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In April 1994, Esther Braverman (Braverman or the trustor) signed a living trust known as the Ester Braverman Living Trust (the Trust). The Trust contains a provision stating that at Braverman's death, the trustee was to distribute and allocate specified sums of money to certain persons and entities, including \$200,000 to the Noel Scott Trust. Noel Scott is both the income and principal beneficiary of the Noel Scott Trust. Braverman was Noel Scott's great aunt.

Braverman signed a first amendment to the Trust in June 1999. The first amendment provides that at Braverman's death, the trustee shall distribute and allocate the remaining trust estate as follows: \$100,000 to Sam Braverman if he survives or to the remainder if he does not survive; \$100,000 to Harriet Grabow by right of representation, and \$200,000 to the Noel Scott Trust. With regard to the Noel Scott Trust, the Trust provides that the trustee "shall pay to or for the beneficiary the amount of Fifty Dollars (\$50.00) per month if the beneficiary is incarcerated and Two Thousand Dollars (\$2000.00) per month if the beneficiary is not incarcerated." The Trust provides that at Scott's death, the trustee shall distribute the remaining trust estate in equal shares to

specified associations and organizations.² The sole change to the Noel Scott Trust made by the first amendment was to eliminate the "American Red Mogan David for Israel, Los Angeles Affiliate" from the entities to receive distributions at Scott's death.

In January 2008, Scott petitioned under Probate Code section 15409, subdivision (a)³ to modify and/or reform the Noel Scott Trust to increase his monthly distribution to \$250 per month, or alternatively to grant powers to the trustee (Comerica Bank) that would allow it to so increase his monthly distribution. Scott contended that Braverman's intent in establishing the Trust in 1994 was to give him the necessary funds to support his health and welfare while inside and outside of prison, but that she did not expect him to be incarcerated in 2007 and therefore did not consider whether \$50 would be enough to support his needs 10 to 15 years later. He sought the increase due to his medical conditions and increased medical expenses; according to Scott, the increase to \$250 per

² These are the American Heart Association, Los Angeles Affiliate; Jewish Community Foundation of the Jewish Federation Council of Greater Los Angeles, National Jewish Center for Immunology & Respiratory Medicine, Denver, Colorado; City of Hope, Duarte, California; American Cancer Society, Los Angeles, California; Good Samaritan Hospital, Los Angeles Affiliate; Arthritis Foundation, Los Angeles, California; United Way, Los Angeles Affiliate; American Red Cross, Los Angeles Affiliate; Jewish Braille, Los Angeles Affiliate; and the Salvation Army, Los Angeles Affiliate.

³ Section 15409 subdivision (a) provides: "On petition by a trustee or beneficiary, the court may modify the administrative or dispositive provisions of the trust or terminate the trust if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust. In this case, if necessary to carry out the purposes of the trust, the court may order the trustee to do acts that are not authorized or are forbidden by the trust instrument."

month would guarantee that the purpose of the trust fund would be met. Scott signed his petition under penalty of perjury. The trustee did not oppose or object to Scott's petition.

At the hearing on Scott's petition (which took place via a telephone conference), the probate court observed that the face of the trust did not contain any indication that the purpose of the Noel Scott Trust was to ensure Scott's needs for necessities were met. Pointing to the disparity between \$50 allocated to him while in prison and \$2000 when he was released, the court stated it appeared Scott was to get a modest bequest while incarcerated for canteen items and that the primary concern seemed to be his care after release. The court noted there was no other evidence of Braverman's intent, but if she had wanted to let the trustee give Scott money along the way for extras while he was in prison she could have done so. The court stated it found no intent of the trustor to provide for the level of care Scott was seeking, and it would therefore "split the baby" by modifying the trust to provide him \$100 per month from the trust while he was incarcerated.

The probate court accordingly granted in part and denied in part Scott's motion, finding there was no evidence that the Trust was to provide for Scott's "necessities"; that "the purpose of the Trust was to provide a small sum of money to Scott while incarcerated and to provide support to him once he is released from custody." Its order further states: "However, the Court is persuaded that the Trustor may well have relied upon overly-optimistic views as to Scott's release date in setting the amount for such incidental purposes. Scott argued convincingly that in the aftermath of his conviction, family members including himself and the Trustor believed that an appeal would result in

his eventual freedom. Indeed, it appears that the Trustor had sufficient certainty of his eventual release, notwithstanding the life term that was imposed, to provide a monthly support payment upon his release. Accordingly, the Court concludes that, in order to effectuate the Trustor's purpose of providing a small monthly sum to support incidental purchases in prison, the monthly sum must be increased to reflect the decreased purchasing power of the sum provided since the date on which the Trustor executed the trust provision. Accordingly, the Court concludes that such sum should be increased to \$100." Scott appeals from that order.

DISCUSSION

I. *Contentions*

Scott advances several challenges to the probate court's order modifying the trust to provide him with \$100 rather than the requested \$250 monthly payment. He first contends simply that \$100 "will not be enough in lieu of inflation and the fact that [he] must pay all [of his] medical and dental expenses." He also argues the order was the result of a misinterpretation of the trust instrument and the trustor's intent; that the court should have given weight to the fact that he was allocated twice as much as any other beneficiary, which should provide some indication of intent. Scott further contends the trust instrument is ambiguous and the trustor's intent was " 'incorrectly reduced to writing' by an elderly, semi-retired probate attorney, albeit unintentional [*sic*]." Finally, Scott contends the probate court ignored evidence establishing a variety of changed circumstances that were assertedly unforeseen by the trustor including his medical and dental expenses, costly diet and exercise regimen, expenses for "healthy" food, the death

of his grandmother who had provided some support, the loss of his prison job, the loss of support from his mother and brother due to their medical conditions, educational expenses he has incurred due to parole board "demands," and the fact he needed to incur attorney fees for a state appointed attorney at his parole hearing.

Scott seeks to support these claims by signing his appellant's opening brief under penalty of perjury and by appending a separate declaration in which he states in part that after his grandmother passed away in 1995, Braverman with help from his mother and brother provided for all of his needs and expenses "whenever he asked," which he spent on medical devices (arch supports) and vitamins, a guitar and accessories, educational needs and recreational needs (periodicals and music). He avers Braverman also paid for his appellate attorneys in excess of \$100,000 as recently as 2001; that he was "very close" with her and had she known he would be in prison beyond 2003, she would have increased the monthly stipend and paid his dental bills "outright."

II. *Legal Principles Governing Trust Modification and Interpretation*

"[T]he court, under certain circumstances, may modify the terms of the trust, increase or reduce the trustee's powers, and direct advances of income or principal to the beneficiaries." (*Moxley v. Title Ins. & Trust Co.* (1946) 27 Cal.2d 457, 466, italics omitted; see § 15409.) This judicial power is exercised in "exceptional situations" where modification will "carry out, rather than . . . defeat, the primary purpose of the trustor as expressed in the trust instrument" (see *Moxley v. Title Ins. & Trust Co.*, at p. 468) and where the rights of all the beneficiaries may be protected. (*In re Van Deusen's Estate* (1947) 30 Cal.2d 285, 292-293; *Whittingham v. California Trust Co.* (1931) 214 Cal.

128, 134; see also *Adams v. Cook* (1940) 15 Cal.2d 352, 360; *Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 80; *Leonardini v. Wells Fargo Bank & Union Trust Co.* (1955) 131 Cal.App.2d 9, 12; *Estate of Traung* (1962) 207 Cal.App.2d 818, 829; Rest.2d Trusts, § 167, com. a, pp. 354-355.) In such cases, the court is not interpreting the trust (*Traung, supra*, 207 Cal.App.2d at p. 830), it is "only doing what the trustors would have done had they had the same facts before them then that were before this court at the trial of this action." (*Adams v. Cook*, at p. 360.) " 'Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked' " to carry out the trust purposes. (*Id.*, at pp. 360-361.)

The court, however, " 'should not permit a deviation simply because the beneficiaries request it where the main purpose of the trust is not threatened and no emergency exists or is threatened.' " (*Crocker-Citizens National Bank v. Younger* (1971) 4 Cal.3d 202, 211, quoting *Stanton v. Wells Fargo Bank* (1957) 150 Cal.App.2d 763, 770.) "It must be remembered that it is the theory of this rule that, by the exercise of this power, the court is not defeating the trust, but in fact is furthering it. The equity court is simply doing what the testator, presumably, would have done had [she] anticipated the changed conditions. In other words, the specific intent of the testator is disregarded in order to enforce [her] general intent." (*Stanton v. Wells Fargo Bank*, at p. 770; see also *Estate of Traung, supra*, 207 Cal.App.2d at p. 831.)

"In construing trust instruments, as in the construction and interpretation of all documents, the duty of the court is to first ascertain and then, if possible, give effect to

the intent of the maker." (*Estate of Gump* (1940) 16 Cal.2d 535, 548; see § 21102, subd. (a) [trustor's intent controls]; *Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 453.) It is axiomatic that we look to the instrument creating the trust to determine the trust's nature, extent and object; those aspects should be ascertained from the whole of the trust instrument, not just separate parts of it. (*Moxley v. Title Ins. & Trust Co.*, *supra*, 27 Cal.2d at p. 463; *Ike v. Doolittle*, *supra*, 61 Cal.App.4th at p. 73.) "Accordingly, in ascertaining the intention of the trustor the court is not limited to determining what is meant by any particular phrase but may also consider the necessary implication arising from the language of the instrument as a whole." (*Brock v. Hall* (1949) 33 Cal.2d 885, 890.)

The interpretation of a trust instrument presents a question of law unless the interpretation turns on the credibility of or a conflict in extrinsic evidence. (*Burch v. George* (1994) 7 Cal.4th 246, 254, abrogation on a different point as stated in *Estate of Rossi* (2006) 138 Cal.App.4th 1325, 1339-1340.) Having no conflicting extrinsic evidence before us and seeing no apparent issues of credibility, we independently construe the trust instrument. (*Burch v. George*, at p. 254.) We keep in mind that in the field of interpreting trusts, each case depends on its own particular facts, and " ' ' . . . precedents have comparatively small value. . . . ' ' " (*Ike v. Doolittle*, *supra*, 61 Cal.App.4th at p. 73, citing *Wells Fargo Bank v. Marshall*, *supra*, 20 Cal.App.4th at pp. 452-453.)

III. Analysis

In considering Scott's contentions, we abide by fundamental rules of appellate review. Our review of the probate court's decision must be based on the evidence before it at the time it rendered its decision. (See *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) "Augmentation does not function to supplement the record with materials not before the trial court. [Citations.] . . . Rather, normally 'when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.' " (*Vons Companies, Inc. v. Seabest Foods, Inc.*, at p. 444, fn. 3; accord *In re Marriage of Forrest and Eaddy* (2006) 144 Cal.App.4th 1202, 1209.) Scott has not cited any exceptional circumstances that would justify a deviation from this rule in this appeal. In keeping with this principle, we disregard Scott's appellate briefing and attached declaration to the extent they purport to provide additional extrinsic evidence of the trustor's intent that was not before the probate court at the time it considered his petition.

Our assessment of the propriety of the probate court's order requires us to first ascertain the trustor's intent from the Trust, applying the above-stated interpretation principles. Only after we discern that intent we can determine whether Scott's requested modification is a lawful deviation to carry out the trustor's intentions in view of changed circumstances. In construing a trust, "it is proper for the trial court in the first instance and the appellate court on de novo review to consider the circumstances under which the document was made so that the court may be placed in the position of the testator or trustor whose language it is interpreting, in order to determine whether the terms of the

document are clear and definite, or ambiguous in some respect. [Citation.] Thus, extrinsic evidence as to the circumstances under which a written instrument was made is admissible to interpret the instrument, although not to give it a meaning to which it is not reasonably susceptible.' " (*Ike v. Doolittle, supra*, 61 Cal.App.4th at p. 73, quoting *Wells Fargo Bank v. Marshall, supra*, 20 Cal.App.4th at p. 453; see also *Estate of Powell* (2000) 83 Cal.App.4th 1434, 1440.) "[W]here . . . the extrinsic evidence is not in conflict, construction of the [trust or] agreement is a question of law for our independent review." (*Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 556.)

With respect to the circumstances surrounding execution of the trust, the trust's provisions for distributions to Scott indicate the trustor was well aware he was incarcerated at the time of the trust's creation. The Trust contains an unambiguous provision entitled, "Income & Principal," stating simply that "[t]he trustee shall pay to or for the beneficiary the amount of Fifty Dollars (\$50.00) per month if the beneficiary is incarcerated and Two Thousand Dollars (\$2000.00) per month if the beneficiary is not incarcerated." We perceive no patent ambiguity in this language.

However, as the probate court noted, the trust is silent as to the object or purpose of the Noel Scott Trust. In his petition, Scott maintained without meaningful explanation that the trustor's purpose was to provide for "the necessary funds to support his health and welfare while in and out of prison." On appeal, Scott argues the trust is ambiguous because it grants him the largest distribution of any beneficiary (\$200,000) but says nothing more about the trustor's intent; he seeks to blame the trustor's "elderly semi-retired probate attorney" for incorrectly reducing the trustor's intent to writing. The sole

extrinsic evidence before the probate court on the matter was Scott's own sworn statement in his petition before the probate court in which he stated that when the trust was created, both he and the trustor believed he would be out of prison "soon" and long before her passing. He stated that in 1994, \$50 a month could meet his needs as he had additional support from his grandmother at that time, but 13 years later with his grandmother deceased, the amount no longer suffices. Scott offered no extrinsic evidence to explain the reason for the large difference between the monthly payment amount during his incarceration and after his incarceration. The remainder of the trust instrument sheds no light on that question.

Even if we were to provisionally consider the extrinsic evidence and conclude it gives rise to some latent ambiguity in the Trust, we would nevertheless conclude that it does not render the Trust reasonably susceptible to the meaning Scott urges. (See *Ike v. Doolittle*, *supra*, 61 Cal.App.4th at p. 73; *Estate of Russell* (1968) 69 Cal.2d 200, 211 [extrinsic evidence is not admissible to give a written instrument a meaning to which it is not reasonably susceptible].) The fact Scott was left a larger percentage of Braverman's estate than other beneficiaries says nothing about how his share of that distribution is to be used. As stated, the Trust unambiguously contains a significant discrepancy in monthly payments to Scott while incarcerated and upon his release; the allocation during his incarceration is 3 percent of the monthly sum after his release. Further, the trustor knew how to designate monies to be used for necessary health and welfare expenses; she provided for her own benefit that net income from her separate trust estate was to be used for her "health, education, support, comfort, welfare, or happiness to maintain at a

minimum [her] accustomed manner of living." To the extent the trustor's intent can be drawn from the surrounding circumstances of the Trust's execution and the trust's provisions, we conclude the \$50 monthly distribution – a modest sum of money even in 1994 – was not intended to cover Scott's medical or dental care and treatment or general "welfare." " 'If the [extrinsic] evidence offered would not persuade a reasonable man that the instrument meant anything other than the ordinary meaning of its words, it is useless.' " (*Estate of Russell*, at p. 211.)

We turn to the separate question of whether, in view of this intent, the probate court in the exercise of its equitable powers (*Adams v. Cook*, *supra*, 15 Cal.2d at p. 358) properly permitted a deviation from the Trust's plain language to increase Scott's monthly distribution to only \$100 rather than Scott's requested \$250. The probate court found Scott's continued incarceration was sufficiently exceptional or peculiar and not within the trustor's contemplation, such that had she known Scott would remain incarcerated to the present date, she would have taken action to modify the trust to provide a small increase in his distribution for incidental items. This factual finding is supported by unchallenged evidence from Scott's sworn petition that both he and the trustor expected his release from prison before her death, as well as by the Trust's language showing the trustor plainly contemplated Scott's eventual release (despite his life sentence) when she provided for a much more substantial distribution to him on that occurrence.

Importantly, the trustee did not object to providing an increase and no evidence was presented that such an increase would adversely affect the rights of the other beneficiaries between themselves (see *Stanton v. Wells Fargo Bank*, *supra*, 150 Cal.App.2d at p. 771),

or the rights of the residual or remainder beneficiaries. (See *Leonardini v. Wells Fargo Bank & Union Trust Co.*, *supra*, 131 Cal.App.2d at p. 13.) There appears to be sufficient funds to carry out the purposes of the trust even providing an increase of the monthly distribution to adjust for inflation, and the objects and purpose of the Trust are not defeated.

We emphasize that the power to modify a trust must be exercised "sparingly and only in the clearest of cases" and "[d]eviation is not justified merely because it would be more advantageous to the beneficiaries or would offer an expedient solution to problems of trust management." (*Crocker-Citizens National Bank v. Younger*, *supra*, 4 Cal.3d at pp. 211-212.) Under that principle, we conclude the probate court did not err in electing to increase Scott's monthly payment to \$100 rather than the full \$250 he requested in his petition.

DISPOSITION

The order is affirmed.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

IRION, J.